



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1994

Mr. James R. Raup
Law Offices of McGinnis, Lochridge & Kilgore, L.L.P.
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

OR94-163

Dear Mr. Raup:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).¹ Your request was assigned ID# 23165.

Austin Community College ("ACC") received a request for records having to do with the nonrenewal of a teacher's employment contract. You assert that all or portions of three documents are not subject to disclosure because they fall within the attorney-client privilege exception of section 552.107 of the Government Code (former section 3(a)(7), V.T.C.S. article 6252-17a). You contend that several of the requested documents are education records and exempted from disclosure by sections 552.026 and 552.114 (former sections 3(a)(14) and 14(e), V.T.C.S. article 6252-17a). You state that these records may also be protected by a common-law right of privacy under section 552.101 (former section 3(a)(1), V.T.C.S. article 6252-17a). We have considered the exceptions you claimed and have reviewed the documents at issue.

As to the documents you contend contain legal advice, recommendations or opinions, you may withhold the memorandum in its entirety and the marked sections of the notes. The memorandum contains legal advice and recommendations to an ACC official, in the context of an attorney-client relationship with ACC. The marked portions of the notes that specifically concern legal advice and recommendations made by legal

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

counsel for ACC may be withheld. Section 552.107 protects from disclosure legal advice, opinions and recommendations that are privileged within the context of an attorney-client relationship, as in this situation. Open Records Decision No. 574 (1990) at 2-3.

You assert that the other submitted documents are student education records. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 excepts from disclosure educational records unless released in conformity with the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g. FERPA provides that federal funding shall not be made available to "any educational agency or institution which has a policy or practice of permitting the release of educational records" of students without the written consent of the parents of a minor student. 20 U.S.C. § 1232g(b)(1). If the student is 18 years of age or older or attends a postsecondary educational institution, the student must give written consent to allow the release of education records. *Id.* § 1232g(d). Under the provisions of sections 552.026 and 552.114, ACC may not release a student's education records without the student's consent.²

A review of the documents submitted indicate that they are "education records." Education records are those records that "contain information directly related to a student and are maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A). This material includes memoranda and notes from interviews with an identified student, statements from the student, and memoranda and notes compiled by ACC staff and faculty concerning the student. Some of the information may have been compiled during two weeks the student was withdrawn from school. However, all of the information relates to the individual's activities while still a student. Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990) at 2-3 (concerning records compiled after the student left school); 462 (1987) at 14-15. Although these are education records, sections 552.114 and 552.026 protect from disclosure only that information in the documents which would serve to identify or tend to identify the student. Open Records Decision Nos. 332 (1982) at 3; 294 (1981). We have marked the identifying information that may not be disclosed except in accordance with FERPA.

²Section 552.114 requires that "information in a student record at an educational institution funded wholly or partly by state revenue" must be withheld, but may be made available on the request of the student or other authorized person. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974

The term "student record" in section 552.114 has been generally construed to be the equivalent of "education record." *See generally* Attorney General Opinion H-447 (1974); Open Records Decision Nos. 539 (1990); 477 (1987); 332 (1982).

You also contend that some of the documents are protected by the privacy provisions of section 552.101. Information is protected by common-law privacy if it would be highly intimate or embarrassing to a reasonable person *and* the information is of no legitimate public concern. *Industrial Found. of the So. v. Texas Indus. Accident Bd.*, 540 S.W. 2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 93 (1977); Open Records Decision No. 328 (1982) at 2-3. We have marked those portions of the documents which consist of highly intimate and embarrassing information which would be of no legitimate public concern; however, other information for which you claim section 552.101 protection is of legitimate public concern and therefore must be released. Open Records Decision Nos. 579 (1990) at 3-8 (legitimate public interest in release of information that may be embarrassing or questionable); 484 (1987) at 5-6 (public interest in knowing about certain off-duty actions of public servant); 269 (1981) at 3 (public has a "substantial" interest in knowing if public servants are carrying out duties in a law-abiding manner).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 23165
ID# 23654

Enclosures: Marked documents

cc: Charles Zucker, Ph.D.
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(w/o enclosures)